LE COPY

Office Supreme Court, U.S.
FILED
SEP 23 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Nos. 270 and 271

SWIFT & COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

NATIONAL BISCUIT COMPANY AND THE GREAT ATLANTIC & PACIFIC TEA COMPANY, PETITIONERS,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS IN BOTH CASES

DAVID R. OWEN,
Attorney for Petitioner, Swift & Company.

WILLIAM L. MARBURY,
JOHN MARTIN JONES, JR.,
Attorneys for Petitioners, National Biscuit Company and The Great Atlantic & Pacific Tea Company.

The Daily Record Co., Baltimore 3, Md.

INDEX

Table of Contents

	PAGE
Preliminary Statement	1
The Importance of the Question Presented	2
Legislative History and Aministrative Construction	4
The Transactions Involved	6
Conflict With the Hearst Case	9
Conclusion	10

Table of Citations

Cases

Briggs v. United States, 143 U. S. 346	7
National Labor Relations Board v. Hearst Publications, Inc., 322 U. S. 111	9

Miscellaneous

Williston on Sales, Secs. 261, 302	7
Uniform Sales Act, Secs. 1, 18	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Nos. 270 and 271

SWIFT & COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

NATIONAL BISCUIT COMPANY AND THE GREAT ATLANTIC & PACIFIC TEA COMPANY, PETITIONERS,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS IN BOTH CASES

Preliminary Statement

Aside from the bare assertion that no issue of "general importance" is raised by the dispute in the present case between the Secretary of Agriculture and the Comptroller General as to the scope of dairy price support permissible under the Agricultural Act of 1949, the Government's brief in opposition is nothing more than an argument on the merits. We do not believe this to be the appropriate time

to reply to each contention so advanced. However, we do believe that some notice must be taken of certain statements made by the Government which to say the least are highly misleading.

The Importance of the Question Presented

The main argument advanced by the Government in support of its assertion that this case is not important is that the Da-112 transactions covered a period of less than forty-five days. This, it says, together with the fact that the circumstances giving rise to the need for the Da-112 program were unprecedented, shows the case to be of no general importance. But the effect of this decision on the administration of dairy price support goes far beyond the particular transactions involved in this case. By holding that the term "purchase" as used in the Act excludes what would not "normally" be considered as a purchase in spite of the economic effect of the transaction and irrespective of whether or not it subserved the purposes of the statute, the courts below have stripped the Secretary of all discretion in the implementation of a statute which the Government concedes calls for the purchase *method* of price support (US Brief, pp. 4-5). In short, the Secretary is placed in this position: When he is faced with a situation which cannot be handled effectively by transactions which the lower courts have found to be "normal purchases", he is unable to act at all. For, had "normal purchases" not been ineffective, the undesirable circumstances would not have arisen in the first place.

Moreover, the factual situation which gave rise to Da-112, although unprecedented up to that time, can hardly be said to be unique or "not likely to recur". Even a superficial knowledge of current agricultural events would make the Department of Justice aware of the fact that the market

conditions which necessitated Da-112 were duplicated in March and April of this year when Secretary Benson again reduced the support levels for the ensuing market year commencing on April 1. Although it is not in the record and could not be since the record in this case was closed, it is a matter of common knowledge in the industry that the Department of Agriculture, in March of 1958, gave serious consideration to a program similar in all respects to Da-112 and that at least one of the reasons why it was not instituted was the refusal of the industry to participate in any special program — however beneficial to the Government and to the industry — until the extent of the Secretary's authority in this area has been finally determined.

The best test of the importance of this case to the administration of the Agricultural Act of 1949 would seem to be the significance which the Department of Agriculture and the dairy farmers themselves attach to it. The dairy farmers, through the National Milk Producers Federation, *amicus curiae*, clearly state that they feel the matter to be of prime importance. The participation in this case by representatives of the Department of Agriculture — as seen by the record — is eloquent testimony as to its views on the matter. In this connection, it should be noted that the Department of Justice has carefully refrained from making any statement in its brief as to Agriculture's position on this question, and has maintained this silence in spite of our contention that fairness requires the Attorney General to inform this Court of the Secretary's views on the importance of the case to his administration of the Act (Swift Pet., p. 12). We sincerely believe that this studied silence is contrary to the plain duty of the Department of Justice to apprise this Court of all relevant facts.

Legislative History and Administrative Construction

A full statement of the pertinent legislative history in this case is set forth in appendixes B and C to the A & P brief filed in the lower court, and filed with this Court along with the petitions. We do not intend at this time to duplicate that statement, but merely to correct certain serious misstatements by the Government at pages 3-6 of its brief.

Far from prohibiting purchases and resales at a loss, the legislative history makes it quite clear that in using the word "purchases" in the Agricultural Act of 1949, Congress intended to authorize such transactions, provided always that they were not in the nature of subsidies which permit the price of the product to fall in a free market. This is made clear by the Congressional history surrounding the OPA resale-at-a-loss program discussed at pages 3 and 4 of the Government's brief, and printed as Defendant's Exhibit 2 (RA, pp. 434-439). In the Congressional debate over that program, Senator Taft explained from the floor (89 Cong. Rec. 6461) that the authority for such a program was not the subsidy power afforded by executive order, but was merely the power to buy commodities and to sell commodities. When questioned by a Congressional committee as to the authority of CCC to engage in the OPA purchase and resale at a loss program, the Solicitor for the Department of Agriculture relied solely on the corporate charter power of CCC "to buy commodities and, of course, to sell commodities". Hearings Before The House Committee on Banking and Currency, 78th Cong., 1st Sess., on H.R. 2725, p. 113. The Government's statement (U.S. Brief, p. 3) that this program was authorized by Executive Order 9250 is just not correct. The Executive Order authorized CCC to use any *existing* power which it had to en-

gage in such activities. It was the power to buy and sell that allowed CCC to establish the program.

In line with this understanding, Congress gave the Secretary the power to purchase cheese and butter (7 USC 1446(c)) and the power to resell such commodities at any price he saw fit, including sales below acquisition price (7 USC 1427). And that is all that he did in the present case. Thus, the question is not whether Da-112 was a *purchase and a resale* at a price less than the acquisition price, but rather whether the purchase phase of the transaction was a "purchase" within the meaning of the Act.

Although cited as an indication that the Department of Agriculture took the position that *all* purchases and resales at a loss are unauthorized under the 1949 Act, the report cited in footnote 9 of the Government's brief, when read in context, makes it perfectly clear that the program to which reference was made was one in which the resale at a loss procedure was used to effect a subsidy. When a purchase and resale at a loss procedure is so used, CCC purchases the entire production of a given commodity at a price which reflects the desired level of income to the farmer and immediately thereafter resells the commodity at whatever lower price is necessary to allow the seller to then place the product on the open market at whatever price the law of supply and demand will bring. This type of operation will, of course, not support the price of the product in the open market, but will in fact drive it down.

Under Da-112 transactions, on the other hand, the product was purchased by CCC at the purchase price in effect at the time of the contract, i.e., the 1953-1954 support purchase price, and resold *after April 1* at the usual mark-up above the then current support purchase price. These transactions, therefore, *supported* the market price of the

commodity by relieving the pressure on the market during the remainder of March, and by returning the products to the market only after April 1 — and then at a price above the then current CCC purchase price. The unanimous opinion of all economists who testified at the trial was that these transactions, unlike the subsidy procedure, supported the price of the commodity in question (Black, RA, pp. 315-320; 321-322; 334; 337; 338-341; 342-343; Gaumnitz, RA, pp. 180-183; 186; 188; 193; 203-205; 230; Emery, RA, pp. 68; 57-60; 61-68; 84; 91-92).

The distinction between these two types of purchase and resale at a loss operations can be seen from the opinions of the Solicitor of Agriculture and the Attorney General of the United States which were offered in evidence as Plaintiff's Exhibit 46 (RA, pp. 567-576) and Plaintiff's Exhibit 43 (RA, pp. 576-580). The Solicitor held that a purchase and resale at a loss program of the type described in the Secretary's report to Congress discussed above could not be instituted under the Agricultural Act of 1949. The Solicitor's view was adopted by the Attorney General in his opinion on the express assumption that it was based on the "use of the so-called wash sale operation to circumvent the legislative purpose in not authorizing subsidy payments as a method of support" (RA, p. 578). In view of the clear distinction between these two methods and the express concession by Government counsel that the opinions of the Solicitor and the Attorney General deal with problems not present in this case (RA, pp. 117-118), we are somewhat surprised at the Government's attempt to lead this Court to believe that no such distinction exists.

The Transactions Involved

The discussion of the transactions involved at pages 6-9, as well as the argument at pages 14-18 of the Government's

brief disclose the superficial nature of its position. The Government merely catalogues the various ways in which the Da-112 transactions differ from ordinary commercial purchases. Thus, it points out that no physical delivery was made; that the risk of loss remained with the seller; that one check was sent by CCC instead of two checks, one from the purchaser to CCC, and one from CCC back to the purchaser; that CCC was "committed" to resell the goods to the purchaser. In the first place, the elements mentioned by the Government, even under a strict application of ordinary sales law, do not prohibit title from passing and a completed sale from taking place if the parties express their intention to effect a sale, as they did in this case. (Uniform Sales Act, Secs. 1, 18; Williston, Sales, Secs. 261, 302; *Briggs v. United States*, 143 U.S. 346, 354.) Secondly, and more importantly, none of these elements has anything to do with *price support* and the Government does not even attempt to point out how their lack in any manner hampered the price supporting effect of Da-112.

Footnote 4 of the Government's brief is nothing more than a restatement of the argument — which was rejected by both of the courts below — that CCC should deal only with those companies which in turn deal directly with the farmer. However, the undisputed testimony in the record is that the integrated nature of the dairy industry requires CCC to purchase from anyone having cheese in carload lots. This policy was established at the inception of price support programs and has been adhered to ever since (RA, pp. 22-24). It may be noted in passing that Swift & Company deals directly with the farmer as a manufacturer, and that although A & P and National Biscuit do not deal directly with the farmer, they are substantial purchasers of cheese and butter from manufacturers who do.

In fact, A & P purchases the entire output of from twenty to twenty-five cheese factories (Stipulation of counsel, RA, p. 598).*

However convenient it may be for the Government to cite statements by the District Court to the effect that "evidence of benefit to farmers was nebulous" (US Brief, p. 10), the fact remains that the Court of Appeals did not affirm this opinion of the lower court. In fact, the Court of Appeals summarized the testimony of the expert witnesses as follows (A & P Pet., p. 35): "[These transactions under Da-112]—

(1) helped to support the price paid to dairy farmers for milk and butterfat during the month of March.

(2) tended to assure the effectiveness of support activities during the ensuing year and to minimize the expense thereof;

---

* The record is clear that had the petitioners: (1) signed two pieces of paper instead of one; (2) written one check and received one back from the Government, instead of one check for the difference; and (3) made a senseless physical delivery of cheese to CCC, and received an equally senseless physical redelivery, the transactions would not have been subject to dispute, even though the exact same result would have been achieved. The undisputed evidence in the Record is that the petitioners could have sold their cheese and buttter to CCC under announcements Da-100 and Da-99 and repurchased the same at the lower price under announcement Da-107. And such repurchase could have been made prior to the time that the seller was called upon to make physical delivery to CCC, due to the administrative time-lag (RA, pp. 72-73; 76-77; 128-131). The record shows that this was in fact done in certain cases (RA, pp. 546-551). The Government's statement, at page 15, that substantial charges for re-packaging would have prevented many sales of cheese can hardly apply to the present petitioners. By its statement in open court (RA, p. 359), the Government conceded that A & P's and National Biscuit's cheese was already packaged in boxes which met the requirements of Da-270 (standard packaging specification), and thus could have been sold under Da-100 without repackaging. As to Swift, the uncontradicted testimony is that the cheese would have been sold in any event, and the re-packaging charges, where applicable, absorbed (RA, p. 248).

(3) promoted the orderly distribution of dairy products and the commercial consumption thereof;

(4) saved the Government money and prevented useless expenditures by the butter and cheese industry."

In view of the fact that there was no evidence to the contrary, it is not surprising that the Court of Appeals declined to subscribe to the District Court's economic judgment, and grounded its opinion solely on the definition of the word purchase, "irrespective of the effect that the Da-112 transactions may have had upon the price level of dairy products" (A & P Pet. 36). Surely the determination of the Secretary of Agriculture as to the economic effect of a given transaction, supported as it was by the unanimous testimony of all the economic witnesses who testified at the trial, is worth more than the mere *ipse dixit* of the Department of Justice or the unaffirmed opinion of the trial judge — *a fortiori* when the dairy farmers themselves tell this Court that they did receive benefit from the Da-112 transactions (Brief of *Amicus Curiae*, pp. 10-12).

Conflict With the Hearst Case

The Government's attempt, in footnote 8 of its brief (p. 15), to demonstrate that this case is not in conflict with *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111, is as superficial as it is unconvincing. Of course, the present case involves limitations on the Secretary's authority, but the statute involved in the *Hearst* case placed similar restrictions on the Board. In our case, the Secretary can only make "purchases"; in the *Hearst* case, the Board only had authority to deal with matters between employers and "employees". The question in the *Hearst* case was what are "employees"; in our case, what are "purchases". This Court held in the *Hearst* case that

in determining whether a given person was an "employee", the Board's decision would be upheld if compatible with the economic objectives of the Act — even though, under other circumstances, the technical legal aspects of the relationship would have required the conclusion that newsboys were independent contractors and not employees. As stated in our petitions (A & P Pet., pp. 13-15, Swift Pet., pp. 7-8), we think that the same principles apply to this case, and that the decisions below are clearly in conflict with the *Hearst* case.

Conclusion

Fortunately for the petitioners, Judge SOPER'S opinion contains a clear and simple statement of facts which cannot be obscured by any amount of broken-field running. When, therefore, it is insinuated by the Government that the Secretary of Agriculture has attempted to pervert statutory powers conferred on him to support prices to dairy farmers by using them improperly for the protection of a few large processors against inventory losses, we can simply refer to the fact that the Government has expressly conceded the good faith of the officials of the Department of Agriculture and of the defendants (RA, pp. 2, 597), and that as noted by the Court of Appeals, the Government has conceded that the transactions under Da-112 resulted in saving money for the Government (A & P Pet., pp. 38-39). These two admissions would seem a sufficient answer to an argument which might with more propriety have been addressed to a Congressional committee or perhaps to a jury. If a further answer were necessary, the appearance in the courts below and in this court of the National Milk Producers Federation in full support of the position of the petitioners should dispose completely of this flagrant attempt to create prejudice against the petitioners. Within

the appropriate limits of a reply brief, it is not possible to expose every instance in which such tactics have been employed, but we believe that enough has been said to show that the petitions for certiorari should be granted.

Respectfully submitted,

DAVID R. OWEN,
Attorney for Petitioner,
Swift & Company.

WILLIAM L. MARBURY,
JOHN MARTIN JONES, JR.,
Attorneys for Petitioners,
National Biscuit Company and The Great Atlantic & Pacific Tea Company.